# Public Prosecutor v Dragcom Sdn Bhd & Ors and other applications

HIGH COURT (KOTA KINABALU) — CRIMINAL APPLICATION NOS LBN-44–2/8 OF 2012, LBN-44–4/8 OF 2012 AND LBN-44–3/8 OF 2012
RAVINTHRAN PARAMAGURU J
12 MARCH 2013

*Criminal Law — Money laundering — Forfeiture — Monies obtained as result or in connection of money laundering offence — Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLA') s 56 — Application under s 56 (1) of AMLA filed 12 months or more after seizure or freezing order — Jurisdiction of court to entertain delay — Whether court had inherent power not to strike out application on technicality — Whether AMLA provided that application under s 56 should be struck out if made outside stipulated 12 months from date of seizure or delay*

The three applications were made by the public prosecutor under s 56(1) of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLA'). The common ground of the applications was that in all three cases, the monies in question had been obtained as a result of or in connection with a money laundering offence under s 4(1)(a) of the AMLA. Briefly the facts were, the respondents in all the three cases were investigated for a smuggling offence under s 135 of the Customs Act 1967. The issue that was raised to the court was whether the court had jurisdiction to entertain an application under s 56(1) of the AMLA if it was filed 12 months or more after the seizure or freezing order. The prosecution argued that the court had the inherent power not to strike out an application on a technicality such as delay. Furthermore, it was contended that the AMLA did not provide that an application under s 56 should be struck out if it was made outside the stipulated 12 months from the date of seizure or delay.

**Held**, dismissing application:

(1) The word 'may' in s 56(1) of the AMLA was used in the sense that it was up to the public prosecutor to apply for forfeiture. In other words, the use of the word 'may' referred to the general discretionary power of the public prosecutor to proceed with forfeiture proceedings or to return the property. Assuming 'may' was interpreted to mean that the public prosecutor had the discretion to make the forfeiture application 12 months after the seizure or the freezing order, the time stipulation would be rendered utterly meaningless (see paras 11–12).

(2) The legislative aim of the prescribed time limit and a combined reading of sub-ss (1) and (2) led to the conclusion that it was mandatory for the public prosecutor to make the application to forfeit within 12 months. The AMLA was a special law where property might be forfeited although a person might not have been convicted of any offence as long as the court was satisfied that it had been obtained as a result of or in connection with an offence under sub-s 4(1) or a terrorism financing offence. The burden of proof was the civil standard (see para 13).

(3) The public prosecutor and the enforcement agency have wide powers to freeze bank accounts and seize property under the AMLA. It could be reasonably inferred that the aim of the time limit of 12 months in s 56 was to provide a safeguard against the arbitrary use of the extensive powers granted by Parliament to the enforcement authorities and the public prosecutor. Without the time limit prescribed in s 56, affected parties whose properties had been seized would be subject to the sweet will of the public prosecutor in awaiting the final outcome of forfeiture proceedings (see para 13).

(4) The time limit of 12 months should be construed strictly. Furthermore, sub-s (3) clearly stated that if no application was made within 12 months, the property *shall* be released to the person from whom it was seized. The use of the imperative 'shall' in sub-s (3) meant that once the 12 months period had passed, the property must be released. In all the three cases, the 12 months period had lapsed. In the premises, the public prosecutor or the enforcement agency in question was obliged by law to return the property on that date. The application in question which was made after that date was not competent. It was akin to closing the stable doors after the horse has bolted. For the same reason, the breach of the 12 months time period deprived the court of the power to hear this application (see para 13).

(5) As for the extension of time in respect of criminal appeals, the discretion to extend time is provided in s 310 of the Criminal Procedure Code. The learned DPP submitted that s 56 did not provide that an application for forfeiture should be struck out for non-compliance with the time stipulation. This argument had no merit. Since it was mandatory for the public prosecutor to make the application for forfeiture within 12 months, it was superfluous for Parliament to spell out the penalty for non-observance of the time stipulation (see para 14).

(6) The delay in this case was fatal in that the court was deprived of the power to hear the application. The application of the DPP in all the three cases to forfeit the said properties was dismissed. The court also made a consequential order under s 56(3) of the AMLA to the effect that the properties in question must be returned to the respondents (see para 16).

**[Bahasa Malaysia summary**

Ketiga-tiga permohonan dibuat oleh pendakwa raya di bawah s 56(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('APPWH'). Alasan sama dalam permohonan-permohonan adalah bahawa dalam ketiga-tiga kes, wang yang dipertikaikan telah diterima hasil daripada atau berkaitan dengan kesalahan pengubahan wang haram di bawah s 4(1) APPWH. Secara ringkasnya, fakta adalah bahawa responden-responden dalam ketiga-tiga kes telah disiasat bagi kesalahan penyeludupan di bawah s 135 Akta Kastam 1967. Isu yang dibangkitkan di mahkamah adalah sama ada mahkamah mempunyai bidang kuasa untuk mendengar permohonan di bawah s 56(1) APPWH jika ia difailkan 12 bulan atau lebih selepas penyitaan atau perintah pembekuan. Pihak pendakwaan menghujahkan bahawa mahkamah mempunyai kuasa sedia ada untuk tidak membatalkan permohonan atas alasan teknikal seperti kelewatan. Tambahan lagi, dihujahkan bahawa APPWH tidak memperuntukkan bahawa tindakan di bawah s 56 harus dibatalkan sekiranya ia dibuat 12 bulan dari tarikh penyitaan yang ditetapkan atau lewat.

**Diputuskan**, menolak permohonan:

(1) Perkataan 'may' dalam s 56(1) APPWH digunakan dalam mana ia terpulang kepada pendakwa raya untuk memohon bagi penyitaan. Dalam kata lain, penggunaan perkataan 'may' merujuk kepada kuasa budi bicara am pendakwa raya untuk meneruskan dengan prosiding penyitaan atau untuk memulangkan harta tersebut. Menganggap bahawa 'may' ditafsirkan untuk bermaksud bahawa pendakwa raya mempunya budi bicara untuk membuat permohonan penyitaan 12 bulan selepas penyitaan atau perintah pembekuan, tempoh masa yang ditetapkan akan menjadi tidak berguna (lihat perenggan 11 & 12).

(2) Matlamat legislatif bagi had masa yang ditetapkan dan bacaan bersesama sub-ss (1) dan (2) membawa kepada kesimpulan bahawa adalah mandatori ke atas pendakwa raya untuk membuat permohonan penyitaan dalam masa 12 bulan. APPWH adalah undang-undang khas yang mana harta boleh disita walaupun seseorang itu belum disabitkan atas sebarang kesalahan selagi mana mahkamah berpuas hati bahawa ia telah diperolehi hasil atau berkaitan dengan kesalahan di bawah sub-s 4(1) atau kesalahan keganasan kewangan. Beban pembuktiannya adalah bersifat sivil (lihat perenggan 13).

(3) Pendakwa raya dan badan penguatkuasaan mempunyai kuasa yang luas untuk membekukan akaun-akaun dan menyita harta di bawah APPWH. Ia boleh disimpulkan secara munasabah bahawa matlamat had masa 12 bulan di bawah s 56 adalah untuk memperuntukkan suatu langkah keselamatan terhadap penggunaan kuasa tambahan yang diberikan oleh Parlimen kepada pihak penguatkuasaan dan pendakwa raya, dengan

sewenang-wenangnya. Tanpa had masa yang ditetapkan di bawah s 56, pihak-pihak yang mana hartanya telah disita akan tertakluk kepada kehendak pendakwa raya dalam menanti keputusan akhir prosiding penyitaan (lihat perenggan 13).

(4) Had masa 12 bulan mestilah ditafsirkan dengan ketat. Tambahan lagi, sub-s (3) jelas menyatakan bahawa jika tiada permohonan dibuat dalam masa 12 bulan, harta tersebut akan dilepaskan kepada orang yang daripadanya ia dirampas. Penggunaan imperatif perkataan 'shall' di bawah sub-s (3) bermaksud bahawa apabila tempoh 12 bulan telah tamat, harta tersebut mesti dilepaskan. Dalam ketiga-tiga kes, tempoh 12 bulan tersebut telah tamat. Dalam kes ini, pendakwa raya atau badan penguatkuasaan yang terlibat berkewajipan untuk memulangkan harta tersebut pada tarikh yang dinyatakan. Permohonan yang dipertikaikan dibuat selepas selepas tarikh tersebut adalah tidak kompeten. Ia adalah seperti menutup pintu-pintu kandang selepas kuda telah dilepaskan. Atas alasan yang sama, pelanggaran had masa 12 bulan mengekang kuasa mahkamah untuk mendengar permohonan ini (lihat perenggan 13).

(5) Bagi lanjutan masa berkenaan rayuan-rayuan jenayah, budi bicara untuk melanjutkan masa diperuntukkan di bawah s 310 Kanun Tatacara Jenayah. Timbalan pendakwa raya menghujahkan bahawa s 56 tidak memperuntukkan bahawa permohonan penyitaan harus dibatalkan atas alasan ketakpatuhan masa yang ditetapkan. Hujahan ini tidak bermerit. Oleh kerana menjadi mandatori bagi pendakwa raya untuk membuat permohonan penyitaan dalam masa 12 bulan, adalah tidak perlu bagi Parlimen memperuntukkan penalti kerana tidak mengikut masa yang ditetapkan (lihat perenggan 14).

(6) Kelewatan dalam kes ini adalah menjejaskan yang mana mahkamah terhalang kuasanya daripada mendengar permohonan. Permohonan oleh timbalan pendakwa raya dalam ketiga-tiga kes untuk menyita harta-harta ditolak. Mahkamah juga membuat perintah berikutnya di bawah s 56(3) APPWH yang memberi kesan bahawa harta-harta yang dipertikaikan mestilah dipulangkan kepada responden-responden (lihat perenggan 16).]

**Legislation referred to**

Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 4(1)(a), 44, 44(1), (2)(b), 50, 50(1), 51, 55, 56, 56(1), (2), (3)

Criminal Procedure Code s 310

Customs Act 1967 s 135

*Mohd Fareez bin Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the applicant.*

*JM Martin (JM Martin & Associates) in Criminal Application LBN-44–2/8 of 2012 and Criminal Application LBN-44–4/8 of 2012 for the respondent.*

*Ram Singh (Ram Singh & Co) in Criminal Application LBN-44–3/8 of 2012 for the respondent.*

**Ravinthran Paramaguru J:**

INTRODUCTION

**[1]** The three instant cases are applications by the public prosecutor under s 56(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613) ('AMLA'). As all the three applications were heard at the same time and the preliminary issue of law that arose was the same, I shall give a joint judgment in respect of all three cases. The common preliminary issue of law that arose in all three cases was whether the court has jurisdiction to entertain an application under s 56(1) of the AMLA if it is filed 12 months or more after the seizure or freezing order.

BACKGROUND FACTS

**[2]** In Criminal Application LBN 44–2/8 of 2012 (*Public Prosecutor v Dragcom Sdn Bhd and three others*), the public prosecutor has applied to forfeit monies held in 15 bank accounts of the four respondents. The said bank accounts and monies held in the said accounts are listed in paras (a)–(q) of the notice of motion. The application was filed on 23 August 2012. The above bank accounts were frozen by the order of the public prosecutor under s 50(1) of the AMLA on 19 August 2011. The affidavit in support was affirmed on 16 August 2012 but the application was filed in court only on 23 August 2012.

**[3]** In Criminal Application LBN 44–4/8 of 2012 (*Public Prosecutor v Kropkop CSC Enterprise and another*), the public prosecutor has applied to forfeit monies held in nine bank accounts of the two respondents. The said bank accounts and monies held in the said accounts are listed in para 1(a)–(i) of the notice of motion. The above bank accounts were frozen by the order of the public prosecutor under s 50(1) of the AMLA on 19 August 2011. The affidavit in support was affirmed on 17 August 2012 but the application was filed in court only on 23 August 2012.

**[4]** In Criminal Application LBN 44–3/8 of 2012 (*Public Prosecutor v Bee Guan Hang Sdn Bhd and two others*), the public prosecutor applied to forfeit monies held in 13 bank accounts of the three respondents. The said bank accounts and monies held in the said accounts are listed in para 1(a)–(n) of the notice of motion. The above bank accounts were frozen by the order of the public prosecutor under s 50(1) of the AMLA on 19 August 2011. In this case,

A the Enforcement Agency of the Customs Department also issued an order to freeze the properties of the respondents on 23 May 2011 under s 44(1) of the AMLA. The affidavit in support was affirmed on 16 August 2012 but the application was filed in court only on 23 August 2012.

B GROUND OF THE APPLICATION

**[5]** The common ground of the applications in all the above cases is that the monies in question had been obtained as a result of or in connection with a money laundering offence under s 4(1)(a) of the AMLA. The respondents in all C the three cases were investigated for a smuggling offence under s 135 of the Customs Act 1967. This means that assuming the respondents were charged for money laundering under s 4(1)(a) of the AMLA, smuggling would have been what is commonly known as the 'predicate' offence.

D FREEZING AND SEIZURE PROVISIONS UNDER AMLA

**[6]** Sections 44 and 50 –51 are provisions under AMLA that empower the relevant authority to effect the initial freezing or seizure of the property in E question. These provisions are found in Part IV of the AMLA which is titled 'Freezing, Seizure and Forfeiture'. The sub-heading to s 44 of the AMLA is 'Freezing of property'. The sub-heading to ss 50–51 reads 'Seizure of movable property in financial institution and Seizure of immovable property' respectively. The power under s 44 of the AMLA is exercisable by an F enforcement agency whereas the power under ss 50 –51 of the AMLA is exercisable by the public prosecutor. The effect of such exercise, whether it is called a 'seizure' or 'a freezing order', is similar under all the above provisions, ie it prevents the disposal of the property. In addition, under s 44(2)(b), the relevant officer can be even empowered to take custody of the property if the G circumstances so require.

FORFEITURE UNDER S 56 OF THE AMLA

**[7]** Under the scheme of the AMLA there are two types of forfeiture, ie H forfeiture of property upon prosecution for an offence under s 55 and forfeiture of property where there is no prosecution under s 56. In the instant cases, there were no prosecution and the public prosecutor proceeded under s 56 of the AMLA which reads as follows:

I 56 Forfeiture of property where there is no prosecution

(1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, *before the expiration of twelve months from the date of the freeze or*

*seizure, apply to a judge of the High Court for an order of forfeiture of that property if* he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —

(a) that the property is the subject-matter of or was used in the commission of an offence under sub-section 4(1) or a terrorism financing offence or is terrorist property; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) *shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.*

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

(Emphasis added.)

PRELIMINARY QUESTION OF LAW

**[8]** The respondents in Criminal Application LBN 44–2/8 of 2012 and Criminal Application LBN 44–4/8 of 2012 were represented by Mr JM Martin whereas the respondents in Criminal Application LBN 44–3/8 of 2012 were represented by Mr Ram Singh. The public prosecutor was represented by DPP Mohd Fareez bin Rahman. At the outset of the hearing, both counsel raised an important preliminary point of law which merited serious consideration. They submitted that the applications under s 56 of the AMLA are bad because such applications were made 12 months after the seizure or freezing order. The learned DPP's response to this argument can be summarised as follows. The court has the inherent power not to strike out an application on a technicality such as delay. He cited a number of civil procedure authorities to support his argument. He also cited, by way of analogy, provisions of the Criminal Procedure Code which empowers the court to grant the extension of time in cases of delay in filing notice of appeal and petition of appeal. Finally, he submitted that the AMLA does not provide that an application under s 56 should be struck out if it is made outside the stipulated 12 months from the date of seizure or delay.

DECISION

**[9]** Section 56(1) of the AMLA provides that:

> … the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture …

**[10]** Section 56(3) of the AMLA provides that:

> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the per son from whom it was seized.

**[11]** It must be noted that the permissive 'may' is employed in sub-s (1). However, my view is that the 12 months time stipulated in s 56 of the AMLA is mandatory and not permissive. My reasons are follows.

**[12]** Firstly it is obvious that the word 'may' is used in the sense that it is up to the public prosecutor to apply for forfeiture. In other words, the use of the word 'may' refers to the general discretionary power of the public prosecutor to proceed with forfeiture proceedings or to return the property. Assuming 'may' is interpreted to mean that the public prosecutor has the discretion to make the forfeiture application 12 months after the seizure or the freezing order, the time stipulation would be rendered utterly meaningless.

**[13]** The second reason is that the legislative aim of the prescribed time limit and a combined reading of sub-ss (1)–(2) lead me to conclude that it is mandatory for the public prosecutor to make the application to forfeit within 12 months. The AMLA is a special law where property may be forfeited although a person may not have been convicted of any offence as long as the court is satisfied that it had been obtained as a result of or in connection with an offence under sub-s 4(1) or a terrorism financing offence. The burden of proof is the civil standard. The public prosecutor and the enforcement agency have wide powers to freeze bank accounts and seize property under the AMLA. It can be reasonably inferred that the aim of the time limit of 12 months in s 56 is to provide a safeguard against the arbitrary use of the extensive powers granted by Parliament to the enforcement authorities and the public prosecutor. Without the time limit prescribed in s 56, affected parties whose properties had been seized would be subject to the sweet will of the public prosecutor in awaiting the final outcome of forfeiture proceedings. Therefore, the time limit of 12 months should be construed strictly. Furthermore, sub-s (3) clearly states that if no application is made within 12 months, the property shall be released to the person from whom it was seized. The use of the imperative 'shall' in sub-s (3) means that the once the 12 months period has passed, the property must be released. In all the three cases before me, the 12 months period had lapsed on 18 August 2011. In the premises, the public prosecutor or the enforcement agency in question was obliged by law to return

the property on that date. In the premises, the application in question which was made after that date is not competent. It is akin to closing the stable doors after the horse has bolted. For the same reason, it is also my view that the breach of the 12 months time period has deprived the court of the power to hear this application.

**[14]** In arriving at the above conclusion, I have not omitted to consider the authorities cited by the learned DPP in respect of extension of time. However, I do not find them to be relevant. It is well known that numerous time stipulations govern the conduct of civil proceedings. However, provisions have been made in rules of court to specifically grant discretion to the court to extend time in suitable cases. As for the extension of time in respect of criminal appeals, the discretion to extend time is provided in s 310 of the Criminal Procedure Code. The learned DPP submitted that s 56 does not provide that an application for forfeiture should be struck out for non-compliance with the time stipulation. This argument has no merit. Since it is mandatory for the public prosecutor to make the application for forfeiture within 12 months, it is superfluous for Parliament to spell out the penalty for non-observance of the time stipulation. The more relevant question to ask is whether the AMLA provides for extension of time in respect the time stipulation in s 56. As it does not provide for extension of time, in my view the court has no power to grant the same.

**[15]** Before I conclude, for sake of completeness, I must address a point that was raised by the DPP in respect of the date on which the application was made. The date of filing endorsed on the notice of motion in the three cases is 23 August 2012. This was not denied by the DPP. He also did not deny that the freezing orders or seizure orders in all the three cases were made more than 12 months before that date. However, he attempted to argue that he had emailed the application before 19 August 2012 to the court interpreter in Labuan. He then submitted that the application was made within 12 months. This submission is plainly without any merit. An application is made either by submission of hard copies of the cause papers at the court registry or submission of soft copies through the e-filing system of the court. It is certainly not made through emailing copies to the court interpreter. One can only imagine the chaos that would result if emailing of cause papers to court interpreters is equated with proper filing at the court registry.

CONCLUSION

**[16]** For all the above reasons, I find that the delay in this case is fatal in that the court is deprived of the power to hear the application. I shall therefore dismiss the application of the DPP in all the three cases to forfeit the said

properties. I also make a consequential order under s 56(3) of the AMLA to the effect that the properties in question must be returned to the respondents.

*Application dismissed.*

Reported by Afiq Mohamad Noor